



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Forge Ahead Company--Declaration of
Entitlement to Costs

File: B-256681.2

Date: November 28, 1994

Michael S. LaForge for the protester,
Daniel A. Culver, Esq., and William R. Medsger, Esq.,
Department of the Army, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Protester is not entitled to award of the costs of filing and pursuing its protest where the agency stated in its agency report that it was taking corrective action and it acted reasonably and without undue delay in its implementation of the corrective action promised.

DECISION

Forge Ahead Company requests that our Office declare it entitled to recover the reasonable costs of filing and pursuing its protest against the award of a contract to Mr. Bryan E. Young, the incumbent contractor, under request for proposals (RFP) No. DAAC07-93-R-0002, issued by the Department of the Army for the operation of recreational facilities at the Sierra Army Depot, Herlong, California.

We deny the request.

Forge Ahead protested to our Office on March 10, 1994, that because the RFP was set aside for small disadvantaged business (SDB) concerns, Mr. Young, who was not an SDB concern, was ineligible for award. The protester also contended that the RFP's specifications "were deficient" and that "the solicitation was not readvertised as either a

(s)mall (b)usiness set-aside or as a full (and) open competition and consequently [Forge Ahead] was not given the opportunity to re-bid."

The agency stated in its report to our Office, filed on April 14, that its award to Mr. Young was improper, and that it would take corrective action by resoliciting the requirement with revised specifications as a small business set-aside to obtain a replacement for the improperly awarded contract. Although Forge Ahead challenged the propriety of the agency's proposed corrective action in its comments on the agency report, we found Forge Ahead's arguments to be without merit, and dismissed Forge Ahead's protest as academic on May 27.

Forge Ahead requests that we declare it entitled to recover the costs of filing and pursuing its protest. Under our Bid Protest Regulations, we may declare a protester entitled to recover the reasonable costs of filing and pursuing its protest, including attorneys' fees, where the agency decides to take corrective action in response to a protest, 4 C.F.R. § 21.6(e) (1994). In adopting this regulation, we did not intend to award costs in every case where the agency takes corrective action in response to a protest. Our intent was to award costs where the circumstances of the case reflected that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Special Sys. Servs., Inc.--Entitlement to Costs, B-252210.2, June 8, 1993, 93-1 CPD ¶ 445. We do not view the time taken by the agency to take corrective action here--25 working days--as unreasonable. The agency's action, initiated early in the protest process, provides no basis for a determination that the payment of costs is warranted. Id.

Forge Ahead nevertheless maintains that it is entitled to the costs of pursuing its protest because the agency waited nearly 4 months after promising to resolicit the requirement with revised specifications as a small business set-aside to actually do so. In advancing this argument, Forge Ahead relies on our decision in Commercial Energies, Inc.--Recon. and Declaration of Entitlement to Costs, 71 Comp. Gen. 97 (1991), 91-2 CPD ¶ 499. In Commercial Energies, we found the protester entitled to the award of the costs of filing and pursuing its protest because the agency waited nearly

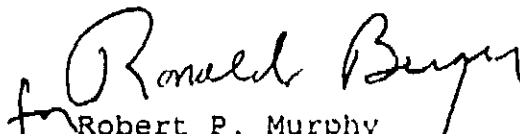
'Forge Ahead did not timely protest the agency's determination that Forge Ahead's proposed price "exceeded the fair market value of the work by more than 100 [percent]," or the resultant decision to resolicit the requirement as a set-aside for small business rather than for small disadvantaged businesses.

5 months to perform the promised corrective action and was unable to provide any explanation for the delay. This case is clearly distinguishable from Commercial Energies because as the explanation below demonstrates the agency acted reasonably in its implementation of the proposed corrective action and without any undue delay.

The agency explains that approximately 2 weeks after it received our Office's May 27 decision dismissing Forge Ahead's protest, the contracting activity delivered to the contracting officer revised specifications for the resolicitation of the requirement. Upon receipt of the revised specifications, the contracting officer began performing the actions necessary to reissue the solicitation. These actions included putting the solicitation into the agency's procurement system, having the revised government estimate reviewed by the cognizant agency personnel, reviewing the solicitation for compliance with the Federal Acquisition Regulation, and forwarding the solicitation package to the cognizant review board and incorporating the review board's recommendations. This process was completed on July 21, and the procurement was synopsized in the Commerce Business Daily on July 27.

Where, as here, the record confirms that the agency acted reasonably and without any undue delay in implementing the corrective action promised, the protester is not entitled to recover the costs of filing and pursuing its protest. See Moon Eng'g Co., Inc.--Request for Declaration of Entitlement to Costs, B-247053.6, Aug. 27, 1992, 92-2 CPD ¶ 129.

The request is denied.


Robert P. Murphy
Acting General Counsel